APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSEL MILTON WILLS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21378

APPEAL from the United States District Court for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 3, 1967.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSEL MILTON WILLS, *Appellant*; vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21378

[October 3, 1967]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Before: CHAMBERS, MERRILL and KOELSCH, Circuit Judges

MERRILL, Circuit Judge:

Appellant stands convicted of refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462 and 32 C.F.R. §1632.14. He has taken this appeal from judgment.

The basis of his refusal to be inducted was his contention that he was classified I-A and summoned for induction because of his action in destroying his draft card as a protest against the Government's policies and actions with respect to Vietnam, and that his classification into I-A was void as a violation of his constitutional right to freedom of speech.

On October 15, 1965, appellant, a full-time student with a II-S deferment, wrote the following letter to his local draft board in Berkeley, California:

"This is to inform your office that 1, I have intentionally destroyed my draft card and will henceforth refuse to carry another. 2, I have signed the C.N.V.A. petition, with which I am sure you are familiar. 3, I will refuse to co-operate with your office in any manner whatsoever. If you wish to take any measures against me, you can contact me at the following address. . . .

"My reasons for these actions are purely patriotic. They may be found in the Declaration of Independence, The U.S. Constitution and the Nurenburg Judgment. I won't bore you with details since I presume that you have heard them often. History will judge both of us, and one will be declared an unintentional murderer. It will not be me."

On October 23, 1965, appellant was notified by his local board that he had been reclassified I-A. No reason for reclassification was given, although the notice advised him of his right to a personal appearance and to an appeal, and also stated: "FOR INFORMATION AND ADVICE GO TO ANY LOCAL BOARD." Appellant did not request a personal appearance or take an appeal. On January 31, 1966, he was ordered to report for induction. On February 24, 1966, he refused induction.

I. *Exhaustion of Administrative Remedies*

At the outset we are faced with the contention of the Government that appellant is foreclosed from attacking his reclassification here by reason of his failure to exhaust administrative remedies through the taking of an appeal within the Selective Service System. Such was the holding of the District Court. Although we affirm the judgment of conviction, we disagree with the District Court on the foregoing point.

In the first place, appellant's objection to his classifi-

cation was not addressed to the area of administrative judgment. It did not pose a question upon which courts, bowing to special expertise, would regard the administrative determination as final, save only where basis in fact is lacking. His objection, founded upon a claim of Constitutional right, was one on which courts have little reason to defer to administrative determination. The exhaustion rule loses much of its force in this area. *Cf. Wolff v. Selective Service Local Board No.* 16, 372 F.2d 817, 825 (2d Cir. 1967).

Further, the notice received by appellant on October 23 did not tell the whole story. In reclassifying him I-A, the local board had first proceeded (on October 21), pursuant to its regulations, 32 C.F.R. §1642.4, to declare appellant a "delinquent" for failure to perform duties required of him by the Selective Service Law. This section provides that when a registrant is declared to be a delinquent the board shall mail him a delinquency notice, setting forth the duty he has failed to perform.

The board finally did mail appellant a notice of delinquency (dated October 21, 1965) on January 3, 1966. Notice thus was not received until long after the ten-day period for appeal from reclassification had expired. Appeal does not lie from a declaration of delinquency, but only from the reclassification that follows.

The District Court recognized that the reclassification was not in accordance with the procedure contemplated by the regulations. It stated, however:

> "The requirement [of notice] is to inform the defendant of the acts which resulted in his being declared delinquent and will result in his being I-A."

It found that defendant "knew full well why he was reclassified," and was in no way prejudiced by failure to receive his delinquency notice prior to reclassification.

We quite agree that appellant knew full well why he was being classified I-A. What he did not know was that this classification was based upon a declaration of delinquency. A "delinquency-I-A" status is substantially different from that of an ordinary I-A. Unless otherwise requested by the United States Attorney (§1642.13), the board must call I-A delinquents for induction before all others, even before volunteers (§1631.7). Notice of delinquency is, in substance, a preinduction notice.

As the District Court noted, appellant "was intentionally challenging his draft board to act," but he did not know, in time to preserve (through administrative appeal) his right to assert his constitutional claim, what course that action would take. Failure to give notice of delinquency prior to reclassification may have led appellant to believe that the board or the Government would respond to his challenge otherwise than by immediate induction; by imposing a criminal sanction, in response to which his constitutional claim might be asserted and under which administrative appeal would have been irrelevant.[1] Knowledge of his delinquency status and im-

1. Following receipt of his induction notice appellant sought conscientious-objector classification. This request was duly denied and no issue in this respect is presented here. In his letter seeking reclassification, however, appellant makes statements relevant to our problem. He wrote:

> "As I saw it, two courses of action were then open to you. First, you could prosecute me under civil [*sic*] law for refusal to carry a draft card; I am thinking of the recently passed law imposing a $10,000 fine and/or a sentence of five years in jail, which, hopefully, will be eventually judged unconstitutional under Article Eight of the Amendments to the Constitution of the United States of America. Your second possible line of action, as I saw it, would be to induct me."

pending induction would thus be relevant to appellant's decision whether to appeal, and the board's failure to disclose this fact at the proper time cannot be said to be without consequence to that decision.

Under the circumstances we reject the Government's contention that appellant is barred from attacking his reclassification through failure to exhaust administrative remedies.

II. *Validity of the Board's Action*

A. Appellant first attacks his reclassification as invalid for the reason we have already discussed, that it was contrary to regulations because it preceded the sending of a delinquency notice, relying in part on *Knox v. United States*, 200 F.2d 398 (9th Cir. 1952).

It is true that because of the very limited scope of judicial review of Selective Service decisions, see *Estep v. United States*, 327 U.S. 114 (1946), and the potential severity of the sanctions involved, courts have been particularly sensitive to procedural irregularities and possible abuses by local boards. We recognized in *Knox*, however, that irregularities or omissions which do not result in prejudice to the registrant are to be disregarded. 200 F.2d at 401.

We find no prejudice in the present context. The only consequence, as we have noted above, was that appellant lost the opportunity to secure administrative review of his constitutional claim. We cure that by entertaining the claim here. Thus we conclude that the board's omission was not such as to invalidate the reclassification.

B. We proceed then to appellant's basic contention:

that the act of destroying his draft card was protected symbolic speech of protest; that he has a constitutional right to protest; that reclassification and induction as a sanction against protest cannot be permitted to stand.

The draft board, however, took action not because appellant acted in protest but because his form of protest constituted an act of willful disobedience of the board's requirement that at all times he retain his draft card in his possession. 32 C.F.R. §1617.1.

Appellant clearly would have been subject to declaration of delinquency under 32 C.F.R. §1642.4 and reclassification under §1642.12 for this violation. He insists, however, that it was for the destruction and not for failure to possess that the board acted. He points to the fact that the duty he was charged with failure to perform (as set forth in the board's tardy notice of delinquency) was "Destroyed his Registration Certificate." He refers us to Operations Bulletin No. 282, National Headquarters of the Selective Service System, which advised local boards of Public Law 89-152, amending §12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. §462(b)(3), to make it a criminal offense to knowingly mutilate or destroy a registration certificate. This bulletin advised local boards that when such violations are brought to their attention they should consider whether the registrant-violators should be declared delinquent and their inductions accelerated.

It is against Public Law 89-152 and its legislative history that appellant's principal attack is directed.[2] But

2 Appellant would have us declare that Act an unconstitutional violation of free speech. He relies on *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967), where it was stated:

"In singling out persons engaged in protest for special treatment the

Congress' preoccupation with card-burning, which appellant finds offensive, simply does not concern us here. It does not carry over from the legislative halls to infect and render equivocal action by an entirely independent body. Though Congress may have sought to distinguish them, the two offenses are in truth but one. Destruction is, in fact, no more than a willful and defiant refusal to possess. The card burners know this full well. The act of public destruction of a draft card would not have its dramatic impact as protest were it not also a demonstration of disobedience of the duty to possess and carry that card, for which the protestor is subject to punishment. Appellant in his letter to the board recognized that the two offenses are in fact one so far as the board is concerned. He wrote: "I have intentionally destroyed my draft card and will henceforth refuse to carry another." It was in response to this advice that the board acted.

We conclude that the reclassification and order to report for induction did not violate appellant's constitutional rights.

Affirmed.

---

amendment strikes at the very core of what the First Amendment protects." *Id.* at 541.

But while *O'Brien* held the Act unconstitutional in purporting to impose special treatment on protestors, it recognized that draft-card destruction also constitutes a violation of the requirement to possess and is criminal in that respect. The court was concerned lest, in imposing sentence, the District Court may have been led into regarding destruction as a more serious violation warranting the imposition of greater penal sanctions. The case was remanded for reconsideration of sentence. The determination of guilt was not disturbed.

We do not reach the question of the Act's constitutionality. Appellant was not prosecuted under it. Accepting, arguendo, the *O'Brien* result, we are not here faced with the degrees of severity available to a sentencing court. The question here is not whether the board may impose a more severe sanction for destruction than for nondestructive refusal to possess, but whether it may impose the same sanction, a declaration of delinquency.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

RUSSEL MILTON WILLS,
Defendant.

No. 51150

On this 23rd day of September, 1966 came the attorney for the government and the defendant appeared in person and by retained counsel, Kenneth A. MacDonald, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a finding of guilty by the Court of the offense of violation of Title 50 U.S.C. App., Sec. 462 as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged in the Indictment, and as to said charge is convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS, commencing this date, in such institution as the Attorney General of the United States or his authorized representative may by law designate.

The Court recommends that the defendant not be con-

sidered eligible for parole until such time as he has served at least TWO (2) YEARS of this sentence.

The Court's Memorandum Decision, filed on this date, is by reference incorporated herein as the Court's Findings of Fact and Conclusions of Law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WM. T. BEEKS, *United States District Judge.*

DATED: September 23, 1966.

Presented by:

MICHAEL J. SWOFFORD, *Asst. U.S. Attorney.*

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. RUSSEL MILTON WILLS, *Defendant.*	No. 51150 MEMORANDUM DECISION

Russel Milton Wills, defendant, refused to be inducted into the armed forces of the United States on February 24, 1966, and has been charged with violation of Title 50, U.S.C.A., App. §462(a).

The Selective Service file on this individual contains a record of the events that led Wills to be ordered to report for induction. Wills so reported but refused to be inducted.

The essential events from his record follow.

On October 15, 1965, defendant wrote his local board that he had destroyed his draft card (a felony, 50 U.S.C.A., App. §462(b)(3)), would refuse to carry another, and would not further cooperate with the board. Defendant also told the board where to contact him if they wanted to take any action against him.

On October 21, 1965, the defendant's draft board declared him a delinquent pursuant to Selective Service regulation 32 C.F.R. 1642.4, but the local board did not at that time mail a notice of delinquency to the defendant.

On October 23, 1965, the local board reclassified the

defendant from II-S to I-A pursuant to Selective Service regulation 32 C.F.R. 1642.12 and mailed notice of this reclassification to the defendant.

On January 3, 1966, the local board mailed the notice of delinquency to the defendant. This notice was dated October 21, 1965.

On January 31, 1966, the defendant was ordered to report for induction.

On February 24, 1966, the defendant refused to be inducted and signed a statement so stating.

Wills argues that he was denied due process of law by the failure of his local board to mail him the notice of delinquency prior to reclassifying him I-A. He correctly argues that Selective Service regulation 32 C.F.R. 1642.10 required his local board to declare him a delinquent in accordance with the provisions of Selective Service regulation 32 C.F.R. 1642.4. He then argues that Selective Service regulation 32 C.F.R. 1642.4 requires his local board to take three actions prior to reclassifying him I-A: (1) Enter a record of the delinquency action in his file; (2) complete a delinquency notice in duplicate setting forth the duty he failed to perform; and (3) mail the original of the notice to him.

Admittedly the local board failed to mail the delinquency notice to Wills until about two and one-half months after the board had reclassified him I-A. The defendant argues that the I-A classification was improper and violated due process of law and thus the order to report for induction was invalid and that he is not guilty of refusing to be inducted as charged.

It is the opinion of this court that while Wills' local board technically erred in not mailing the delinquency notice prior to reclassifying him I-A, such error does not invalidate the I-A classification and subsequent order to report for induction.

Selective Service regulation 32 C.F.R. 1642.4 requires the delinquency notice mailed to the registrant to set forth the duty the registrant has failed to perform. The requirement is to inform the defendant of the acts which resulted in his being declared a delinquent and will result in his being classified I-A. The registrant is also directed to communicate with his local board immediately. Such delinquency notice would be important when the registrant had unknowingly failed to perform a required duty or when third party information given to the board alleged the registrant had so failed to perform his duties.

But that is not the situation with respect to defendant Wills. Wills wrote his draft board that by his own voluntary and intentional act he had destroyed his draft card. He also told them where to reach him for whatever action they desired to take. There is no way he could have been misled when he received notice of reclassification classifying him I-A postmarked a week after he mailed his letter to his draft board.

Accordingly, the court concludes that Wills was in no way prejudiced by the failure of his board to mail him the notice of delinquency since he had by his own act caused his reclassification to I-A. "Procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox v. United States*, 200 F.2d 398, 401 (9th Cir. 1952).

Even if Wills initially was prejudiced by the failure of his board to send him the delinquency notice he subsequently failed to exhaust his administrative remedies. The notice of classification mailed to him on October 23, 1965, advised him of his right to appear personally before his board, or to request an appeal directly to the appeal board, or to go to any local board for advice. The defendant did not take any of these actions to determine the reason for or to challenge the reclassification. He knew full well why he was reclassified. The text of his October 15, 1965 letter to his draft board reads, "If you wish to take any measures against me you can contact me at the following address. . . ." This language plus the fact he destroyed his draft card indicates that Wills was intentionally challenging his draft board to act.

Evans v. United States, 252 F.2d 509, 511 (9th Cir. 1958), followed *Falbo v. United States*, 320 U.S. 549, 88 L.Ed. 305 (1944) (and other cases) in applying the exhaustion of administrative remedies rule. In *Evans* the court held that when the jurisdiction of the local board is in doubt the failure to appeal would bar a judicial attack on the local board's classification. The court went on to hold that even where the registrant claims lack of due process in the board's classification procedure he is not relieved from asserting his administrative appeal remedies.

This court holds that any error made by Wills' draft board in not mailing the delinquency notice to Wills before classifying him I-A was cured by his failure to take any of the administrative appeal remedies available to him.

Since the failure to appeal cured any possible defect

in the I-A classification, Wills' board had jurisdiction to order him for induction.

Wills, having wilfully refused induction, is guilty as charged.

Dated this 23rd day of September, 1966.

WM. T. BEEKS, *United States District Judge*